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IN THE

Supreme Court of the United States

October Term, 1977
No. 77-1573

AMERICAN TELEPHONE AND TELEGRAPH COMPANY and WESTERN ELECTRIC COMPANY, INCORPORATED,

Petitioners,

vs.

EARL E. O'CONNOR, UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF KANSAS,

Respondent.

Brief in Opposition to Petition for Writ of Certiorari.

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EARL E. O'CONNOR, UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF KANSAS,

Respondent.

Brief in Opposition to Petition for Writ of Certiorari.

This brief in opposition to the Petition for Writ of Certiorari is submitted on behalf of the respondent in this action, the Honorable Earl E. O'Connor and on behalf of Milgo Electronic Corporation.

Questions Presented.

1. Should the Supreme Court belatedly review a discretionary decision of a lower District Court on a motion to transfer when extensive interim discovery decisions have been rendered by the lower District Court against Petitioners and Petitioners had waited one and a half years to file for appellate review from the initial lower District Court decision without citing any mitigating grounds for this delay?

2. Should the Supreme Court issue a Writ of Certiorari to review the discretionary decision of (1) a District Court that twice, over a year's period, rejected motions to sever and stay and (2) the subsequent decision of the Tenth Circuit Court of Appeals who rejected Petitioners' requests for review of the lower Court's *second* decision, when at all times Petitioners have failed to provide sufficient verified affidavits of counsel and fact witnesses to support any grounds for transfer on convenience of parties and witnesses?

Statement of the Case.

Nature of the Case.

This is a patent infringement action arising under 28 U.S.C. §1338(a). In this action, Milgo Electronic Corporation (Milgo) has consolidated an action against four corporations that are infringing in Kansas. In an earlier suit[1] (the United suit) in the District Court below, two of the same Milgo patents in suit were held valid and willfully infringed. This action was brought in January, 1976, and two and one half years of complex litigation have gone on before the Court below. In each of numerous proceedings below Milgo has won its entitled discovery, but motions for sanctions and other complex discovery motions are still pending and require additional consideration by the same District Court.

On March 5, 1976, Western Electric Company, Incorporated (Western) and American Telephone and Telegraph Company (AT&T) sought to have the District Court sever and stay the action below as to

[1]*Milgo Electronic Corporation v. United Telecommunications, Inc.* (D.C. Kan. 1976), 189 U.S.P.Q. 160.

defendants Southwestern Bell Telephone Company (Southwestern Bell) and Boeing Computer Services, Inc. (Boeing), and further to transfer the action to New York as to Western and AT&T.[2]

Although affidavits of counsel, a supervisor employee, and two affidavits of presumably expert witnesses were filed, the convenience of fact witnesses and parties were not established by AT&T and Western. AT&T and Western did not provide any affidavits listing any fact witnesses they intended to call, what they would testify to, or describing the inconvenience or unlikelihood of procuring their attendance.

Under such circumstances, the District Court had ample discretion to accord little weight to their argument of witness inconvenience, particularly since this case is primarily one for expert witnesses.

Western and AT&T further submitted an affidavit by a Western Union attorney, M. I. Borsella, listing the last-known address of certain retired Western Union employees, and stating his belief that they *might* have been involved in relevant activities and *might* have relevant knowledge. This affidavit was entirely speculative and conclusory and relied largely on hearsay. No proposed testimony or facts relating to inconvenience was set forth, nor did it identify whether any proposed testimony would have been factual or expert. This affidavit also was due little or no weight under the

[2]It should be noted that Western had previously sued Milgo in the Southern District of Florida for patent infringement on the same type of technical equipment, *Western Electric Company, Inc. v. Milgo Electronic Corporation and International Communications Corporation*, CA No. 74-1001, and has never sought to transfer the Kansas action to Florida nor has it raised any issue as to convenience of its witnesses in traveling to Florida.

prevailing law. Even so, Milgo provided ample grounds rebutting these affidavits.

Equally relevant to Petitioners' failure to prove inconvenience is the untimeliness of their petition for appellate review. Respondent Judge O'Connor denied the motion to sever, stay, and transfer on July 23, 1976. Defendants sought no appellate review of this decision, but instead filed a second request to transfer a year later on May 24, 1977, after a tremendous investment had been made in the litigation below by the parties and the Court. Judge O'Connor denied the second motion to transfer, in the interest of justice on June 3, 1977.

Petitioners finally sought appellate review of the denial of the *second* transfer motion on July 29, 1977. Petitioners' appeal was dismissed for lack of jurisdiction, and petitioners thereafter finally filed the Petition for Writ of Mandamus at issue, at the late date of December 2, 1977. This dilatory appeal of Petitioners was obviously to avoid the consequences of various discovery orders that they had lost and had even tried to appeal to the Tenth Circuit.

As framed by Petitioners, the sole issue presented to the Court of Appeals by their Petition for Writ of Mandamus was:

> "A. Did Judge O'Connor on the facts of this case abuse his discretion in refusing to transfer this action as to Western Electric and AT&T to the Southern District of New York for the convenience of the parties and witnesses and in the interest of justice?"

Petitioners raised no question below concerning the patent venue statute 28 U.S.C. §1400(b), but rather

only urged the Court of Appeals to reweigh the factors considered by the District Court.

However, as this Court has held, it is not a proper exercise of the appellate jurisdiction of the Court of Appeals to weigh the evidence, attach credibility and balance the various factors considered in finally deciding whether to transfer a case. Moreover, when all factors are properly considered, the great weight of the evidence favors the decision of the District Court. Therefore, the Tenth Circuit Court of Appeals properly exercised its discretionary authority to deny the Petition for Mandamus. It follows that this Court should deny the Petition for Certiorari.

Statement of the Facts.

(a) The Parties.

The Plaintiff in this action is Milgo Electronic Corporation, a small Florida corporation. Defendant-Petitioner Western is a New York corporation which manufactures the infringing apparatus in Illinois. Defendant-Petitioner AT&T is a New York corporation which operates the nationwide telephone network and owns 100% of Western. The relative size of the parties may be seen by the fact that AT&T and its subsidiaries employ over 900,000 persons, while Milgo employs 1300. Southwestern Bell leases 100% of the allegedly infringing devices in the district of Kansas as well as in the states of Missouri, Texas, Oklahoma and Arkansas. Southwestern Bell is in possession of infringing apparatus manufactured by Western before issuance of Milgo's patents in suit and is therefore additionally liable for damages not recoverable from Western. Defendant Boeing uses 50% of the infringing apparatus leased by

Southwestern Bell in the district of Kansas. The method claims in the patent in issue are only infringed by Boeing and Southwestern Bell in the district of Kansas. Milgo is entitled to an injunction against infringing use by Southwestern Bell and Boeing.

Defendants' pertinent discovery materials are located at such diverse locations as Chicago, St. Louis, New York, New Jersey, North Carolina and Kansas. Document review and depositions have been conducted with extensive supervision by the lower Court at the appropriate locations without any inconvenience to the parties.

(b) Chronology of the Litigation.

Approximately two and one half years ago, on January 23, 1976, Milgo filed this action (the Kansas suit) in the District Court of Kansas, Civil No. 76-15-C2, for infringement of U.S. Patent Nos. 3,524,023; 3,619,503; 3,643,203 and 3,783,194, two of which have already been held valid and willfully infringed by the Court below in the *United* suit. Defendants conceded venue to be proper in the Court below.

After Milgo filed the Kansas suit, AT&T and Western filed a declaratory judgment suit, Civil No. 76-996, in the Southern District of New York (the New York suit) on March, 2, 1976 seeking a determination of the validity and infringement of Milgo's patents. In a transparent attempt to provide a nexus for the New York forum, the wholly owned subsidiary of Petitioners, Bell Telephone Laboratories (Bell Labs) joined in the New York action and separately asserted an unrelated patent interference claim. This same patent interference claim had previously been instigated by Bell Labs in the United States Patent Office against Milgo and was then properly pending before that agency.

Southwestern Bell and Boeing are not parties to the New York action.

On March 8, 1976, Petitioners Western and AT&T filed a motion pursuant to 28 U.S.C. §1404(a) to transfer the Kansas suit to New York and cited the presence of Bell Labs as a factor. On July 23, 1976, almost two years ago, Judge O'Connor, acting within his discretionary authority, denied the motion to transfer. Thereafter, Judge Knapp of the New York Court transferred the New York suit to Kansas as to the patent validity and infringement issues and stayed the unrelated patent interference action, *American Telephone and Telegraph Co. et al. v. Milgo Electronic Corporation et al.* (S.D.N.Y. 1976) 193 U.S.P.Q. 242.

On May 24, 1977 Petitioners made their second motion to transfer to New York. The only new issue presented by the Petitioners' second motion to transfer was the unrelated decision of the First Circuit Court of Appeals to enjoin a separate suit by Milgo, *Milgo Electronic Corporation v. Yellow Freight Systems, Inc.*, Civil No. 76-16-C2, in favor of a suit initiated by Codex Corporation in Massachusetts, *Codex Corp. and Yellow Freight Systems, Inc. v. Milgo Electronic Corp. and International Communications Corp., Inc.*, 553 F.2d 735 (1st Cir. 1977) (the Codex suit). The District Court below denied AT&T and Western's second motion on June 3, 1977, finding transfer would not be in the interest of justice. This decision was correct since the First Circuit decision did not present any relevant new reasons to change the earlier decision refusing transfer. The First Circuit decision was simply a policy decision unique to its fact situation.

The First Circuit decision specifically did not find an abuse of discretion on the part of the District Court, but rather used the case as a vehicle to enunciate a rule of rebuttable presumption that a customer suit, where the manufacturer could not be sued, was to be transferred. Since Western is the manufacturer for the Bell System and was directly sued in the Kansas suit, the First Circuit rule, regardless of the merits of its legal rationale, is not applicable to the present Petitioners.

Even though Judge O'Conner first denied the motion to transfer on July 23, 1976, AT&T and Western did not choose to seek proper appellate review until December 7, 1977, after almost two years of heated litigation and great investment by the Court and Milgo. The Tenth Circuit Court of Appeals denied AT&T and Western's Petition for Writ of Mandamus on January 6, 1978, and it is that denial which AT&T and Western seek to have reviewed by this Court.

REASONS FOR DENYING THE WRIT.

The Interests of Justice Support Judge O'Connor's Decision of Denying a Second Request to Transfer That Is Belatedly Filed.

Petitioners did not seek appellate review of Judge O'Connor's first decision against transfer on July 7, 1976, but rather elected to move for transfer a *second* time a year later after extensive discovery proceedings in the case. Petitioners have never justified this late request for reconsideration. The dilatory nature of Petitioners' request for review and its prejudicial impact on the great investment the Court has made in the proceedings below alone gave Judge O'Connor a sufficient reason to deny transfer in the interests of justice.

Since the Court below first denied transfer, extensive proceedings have occurred below, and numerous orders have been entered by the Court. Numerous issues as to complex protective orders have been settled. An incredible number of motions to compel discovery from the recalcitrant Petitioners have been granted and considerable discovery taken.[3] The Court has further found

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[3]The voluminous papers generated below contain over 462 pages of legal memoranda, 479 pages of affidavits and exhibits and 298 pages of transcripts of oral hearings. A flavor for some of the proceedings may be gained by the following excerpts from opinions of Magistrate Sullivant:

> "On May 12, 1976, Judge O'Connor sustained plaintiff's Motion to Compel Discovery involving the taking of depositions in Montgomery, Illinois. (See P1 #22). A further hearing was held before Judge O'Connor on May 21, 1976, at which time plaintiff's Motion to Compel Discovery and Produce Documents was sustained. (See P1 #25). On June 15, 1976, defendants Motion for a Protective Order (P1 #27) was denied and plaintiff's Motion to Compel Discovery (P1 #24) was sustained. (See P1 #30, 33). In each of the above hearings, plaintiff's Motion

(This footnote is continued on next page)

prima facie control of Bell Labs by Petitioners. Considerable discovery on the merits has taken place including document production and depositions.

Milgo presently has pending below four extensive motions, including motions for sanctions to compensate Milgo for the great financial injury occasioned by Petitioners' violations of Court Orders and the Federal Rules. Each of the motions involves issues as to what the Court below meant by its various past discovery orders, which can only effectively be ruled on by the Court below. The handling of these motions would present a great burden to any transferree court, as well as excessively delay the orderly proceedings of this case.

The Court below has already had to become familiar with the issues of this litigation, the technical terminology, parties, witnesses and attorneys. It would be a monumental waste of judicial time to require Judge Knapp of the New York Court to familiarize himself with all that has gone on since the inception of this case so that he could rule on the pending as well as future discovery motions. Moreover, Judge Knapp could never recapture the conduct and demeanor of the parties in all the live proceedings that have gone on below.

The law is clear that the late, unexcused filing of a petition for Writ of Mandamus on issues that have been presented a number of times to the lower

for Sanctions was deferred for consideration at a later time." (Opinion of August 2, 1976, Exhibit 1).

"The defendants' objections to questions and instructions to witnesses not to answer in the depositions attempted by plaintiff at defendants North Aurora, Illinois plant (the deposition ordered to go forward by Judge O'Connor) are without legal justification. The witnesses are required to answer the questions." (Opinion of June 23, 1976, Exhibit 2)."

Court provide sufficient ground to deny transfer. *McGraw-Edison Co. v. Van Pelt,* 350 F.2d 361, 363-364 (8th Cir. 1965), *Robert Brother, Inc. v. Kurtz Bros.,* 231 F.Supp. 163, 164 note 1, 167-68 (D.N.J. 1964), *Techitrol v. McManus,* 405 F.2d 84, 88 (9th Cir. 1968), *United States v. Olds,* 426 F.2d 562 (3rd Cir. 1970). Additionally, the possibility of conducting discovery and trial by a judge familiar with the subject matter involved has been recognized by Courts as an important fact to weigh in considering transfer. *Wyndham Associates v. Bintliff,* 398 F.2d 614, 620 (2d Cir., 1968), cert. den. 393 U.S. 977 (1968). Overwhelming equities have arisen which standing alone justify Judge O'Connor's denial of transfer at this late date.

Petitioners Did Not Support Their Allegations That Convenience of the Parties and Witnesses Were Due Any Significant Weight.

Petitioners assert, as they did below, that convenience is served by trial in New York because documents and certain expert witnesses are located "on the East Coast." However, Petitioners failed to demonstrate to Judge O'Connor that these factors constituted any real inconvenience and, more important, did not provide sufficient grounds to support a motion to transfer.

The Kansas forum is certainly more convenient for Milgo. Kansas is, in fact, closer to Milgo's facilities in Miami. In the numerous disputes over discovery and other matters which have been litigated below, it has been much more economical for Milgo to fly its counsel from California to Kansas, as opposed to New York City. This convenience to Milgo is enhanced by the fact that Milgo is also litigating the *United*

Case in the Kansas forum, and can confer with its counsel regarding both matters during meetings in Kansas. Milgo has already invested a tremendous amount of resources in establishing the validity of its patents in Kansas. Petitioners' characterization of the suit as involving "East Coast" companies is superficial and designed to evade the fact that Milgo enjoys no convenience advantage in a New York suit.

The following convenience facts favoring trial in Kansas were present when Judge O'Connor considered AT&T and Western's first motion to transfer and they still remain:

(1) Judges O'Connor and Templar are already familiar with the technical terms in the modem field and the basic technology involved in this suit.

(2) The infringing modems are manufactured in Illinois and many pertinent Western witnesses are in Chicago, much closer to Kansas City than New York.

(3) The AT&T modems infringe in Kansas City and in fact, some Milgo method claims are only infringed during use of infringing Bell modems by the users, Boeing and Southwestern Bell.

(4) The documents in possession of AT&T and Western relating to the manufacture of the infringing Bell modems are technical documents which are located in Illinois.

(5) Most of the pertinent Milgo documents and the Bennett and Davey "Bible" are already indexed and reside in the Kansas City Courthouse, as a result of the on-going litigation before Judge Templar in the *United* litigation.

(6) The testimony of Milgo witnesses taken in the *United* litigation are also lodged in the Kansas City Courthouse in the form of depositions and the trial record.

(7) Kansas City is 100 miles closer to Milgo's headquarters in Miami than New York.

(8) A one month trial on the Milgo patent/modem infringement subject matter before Judge Templar has already been completed in Kansas City.

(9) A second trial on the issue of willful infringement and damages has also been completed before Judge Templar.

(10) Milgo filed first and picked Kansas City as its forum.

(11) Finally, substantial savings in trial of the issue of patent validity will be possible in the Kansas Court. The patent validity determination in the *United* case can considerably shorten the retrial of this issue against AT&T and Western. *Illinois Tool Works, Inc. v. Foster Grant Co., Inc.*, 547 F.2d 1300 (7th Cir. 1976).

Western and AT&T's showing below with respect to convenience of witnesses was based on the same broad, unsupported allegations that they now make to this Court and is due little or no weight. The instant suit is a patent infringement suit in which the basic issues are whether Milgo's inventions are obvious and whether its patent claims are infringed. Decisions on both issues are largely based on expert testimony.

AT&T and Western presented two affidavits to the Court below signed by scientists and former employees W. Bennett and J. R. Davey which indicated they might be able to give expert testimony relevant to the obvious-

ness issue.[4] However, AT&T and Western did not file any affidavits stating they intended to call either Mr. Bennett or Mr. Davey at trial nor did they file affidavits that adequately explain why it would be inconvenient for Mr. Bennett and Mr. Davey to attend trial in Kansas.

Convenience of fact witnesses was also not established by AT&T and Western. AT&T and Western did not provide any affidavits by their counsel listing any fact witnesses they intended to call, what they would testify to, or describing the inconvenience or unlikelihood of procuring their attendance.

The burden being on AT&T and Western, and the affidavits on their behalf being insufficient or absent, Judge O'Connor did not have to accord significance to the convenience allegations of AT&T and Western, in exercising his discretion. *Texas Gulf Sulphur v. Ritter*, 371 F.2d 145, 147 (10th Cir. 1967), *Zerance v. William Harvey Research Corp.*, 401 F.Supp. 804, 806 (S.D.N.Y. 1975). Even ignoring the clear insufficiencies respecting the affidavits of W. Bennett and J. R. Davey pointed out above, the Court below did not have to accord significance to the alleged convenience of expert witnesses who are normally paid well to travel around the country and participate in litigation. *McCrystal v. Barnwell City, South Carolina*, 422 F.Supp. 219, 224 (S.D.N.Y. 1976); *Roller Bearing*

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[4]It is important to note that Mr Bennett and Mr. Davey are *former* Bell Labs employees. Since the infringing designs were made over seven years ago, it was unclear from any evidence before the Court below that any present Bell scientists are knowledgeable about the infringement. For example, Milgo's discovery has recently shown that a former Bell modem designer of that era, Mr. D. Spaulding, is currently residing in California, closer to Kansas.

Co. of America v. Bearings, Inc., 260 F.Supp. 639 (E.D. Pa. 1966).

Under the circumstances of this case, access to documents also had no great bearing on the determination below. Milgo's documents are in Miami, and Western and AT&T's are in New Jersey, New York, Chicago, North Carolina, and elsewhere around the country. Relevant Southwestern Bell and Boeing documents are in St. Louis and Kansas City. AT&T and Western have come to Miami to review Milgo's documents, and Milgo has to go to Western and AT&T locations for document review, no matter where this suit is tried. Discovery has been proceeding in this fashion, and the Court below has ably supervised document production and other discovery matters. Under these circumstances, the location of documents can have little effect on a transfer motion. *McCrystal v. Barnwell County, supra* at 224.

Finally, the convenience arguments of Western and AT&T are justly refracted by the relative size of the parties. AT&T and Western are giant corporations which have large operations and assets located throughout the United States. These parties litigate all over the United States, as they choose. In the copending Florida patent suit, Western has sued Milgo in Miami on ten patents assigned on their face to Bell Labs and invented by Bell Labs inventors, including Mr. Davey, whom petitioners suggested might be an expert in this action. Petitioners' expert witness in the Florida suit is a Bell Labs engineer. Judge O'Connor was aware that Petitioners showed no concern for the alleged convenience of their New York forum and proximity to Bell Labs, despite the fact that they could have sued Milgo in New York instead of Florida. Under

the above circumstances, it was well within Judge O'Connor's discretion to further reduce any weight given to AT&T and Western's convenience arguments. *Lanier Business Productions v. Graymar Co.*, 355 F. Supp. 524, 528 (D.Md. 1973), *Commonwealth Edison v. Train*, 71 F.R.D. 391, 394 (N.D. Ill. 1976), *First Nat. Bank of Minneapolis v. White*, 420 F.Supp. 1331, 1337 (D. Minn. 1976); *Herbst v. Able*, 278 F.Supp. 664, 667 (S.D.N.Y. 1966).

Little doubt can remain that the real motive of AT&T and Western in seeking transfer is not their convenience but to escape the Kansas validity judgment and adverse discovery orders.

To grant AT&T's motion to transfer would also not have been in the interest of justice because it would have resulted in wasteful duplicate litigation in Kansas and New York. *Magnavox Co. v. Bailey Mfg. Corp.*, 414 F.Supp. 891 (N.D.Ill. 1976). As Judge O'Connor observed at the hearing on transfer, AT&T and Western's transfer motion was simply an attempt to "whipsaw" Milgo. In an attempt to justify bifurcating the litigation, AT&T and Western characterize Southwestern and Boeing as "nominal" defendants who have stated they would intervene in the New York suit. Both contentions are wrong.

First, Southwestern and Boeing are not nominal defendants. Since Southwestern Bell is liable for its use of Western equipment manufacatured before at least one of Milgo's patents issued, Southwestern Bell is liable for a unique and substantial category of infringement not reachable in an action against Petitioners alone in New York. *Columbia, N.R.R. Co. v. Chandler*, 241 F. 261 (9th Cir. 1917). Moreover, the New

York suit would not be *res judicata* as to those infringing acts which were committed prior to Milgo's filing suit. *Caroll v. Goldschmidt*, 83 F.Supp. 508, 509 (2d Cir. 1897), cert. denied 169 U.S. 705 (1898). Additionally, each one of the defendants, whether a user or manufacturer, is an infringer and wrongdoer, liable for its own infringing acts and subject to an injunction against those acts. *Birdsell Mfg. Co. v. Shaliol*, 112 U.S. 485, 487 (1884).

Second, Southwestern Bell and Boeing never stated to the Court by affidavit or otherwise that they would intervene in New York. Since it would obviously be contrary to their interests to intervene in a forum where venue was improper as to them, Judge O'Connor could give no credibility to AT&T and Western's hearsay statement that Southwestern and Boeing *might* intervene in New York if they saw fit.

Judge O'Connor was correct in denying transfer since the only reasonably foreseeable result of granting Western and AT&T's transfer motion was and is wasteful duplicate litigation.

Another interest of justice favoring litigation of the dispute in the Kansas Court is the conservation of judicial resources made possible by the fact that two of the patents in suit have been litigated and held valid by the Court below. The patent validity determination in the *United* case carries the weight of *stare decisis* and requires AT&T and Western to show some error in the factual findings of the District Court in order to overturn the prior determination of validity. *Illinois Tool Works v. Foster Grant Co.*, 547 F.2d 1300, 1302-1303 (7th Cir. 1976). Hence, the issues on validity will be considerably narrowed over those

presented by a *de novo* trial in a different forum. Conservation of judicial resources favors trial below. Petitioners' motive in seeking transfer is to escape the Kansas validity judgment.

Petitioners argued to the District Court that the unrelated interfering patent suit with Bell Labs now pending and stayed in New York was a significant factor favoring transfer to New York. However, to be of any cognizable weight Petitioners' argument was required to be supported by a precise showing of the issues which were common between the interfering patent claims and the patent validity and infringement claims, *Texas Gulf Sulfur Co., supra* at 148. Petitioners failed to make such a showing below and Judge O'Connor did not abuse his discretion by denying transfer.

Extraordinary and Indisputable Circumstances Are Required for Issuance of the Writ of Mandamus.

Petitioners' reason for granting the writ is that the Respondent Judge O'Connor improperly weighed factors bearing on Petitioners' motion to transfer. Petitioners do not argue that Judge O'Connor considered any factors which are not properly taken into consideration on a transfer motion. Petitioners conceded below that venue was proper as to them in the Kansas District Court and raised no question whatsoever as to the scope or spirit of the venue statute, 28 U.S.C. §1400 (b), before the Court of Appeals.

Under such circumstances, the Court of Appeals had no choice but to deny the Petition for Writ of Mandamus since it would have been an improper exercise of appellate jurisdiction to substitute its weighing of factors bearing on transfer for that of the District Court.

Platt v. Minnesota, 376 U.S. 240 (1964). In *Platt,* the Court of Appeals undertook to reweigh the District Judge's balancing of factors on a transfer motion. This Court stated, 376 U.S. at 245:

> "Here, however, the Court of Appeals undertook a *de novo* examination of the record and itself exercised the discretionary function which the rule commits to the trial judge. This the Court should not have done since the writ cannot be used 'to actually control the decision of the trial court.' "

As Justice Harlan stated in his concurrence, 376 U.S. at 246:

> "Such a course inescapably contravenes accepted principles governing the exercise of appellate jurisdiction."

In both *Platt, supra* at 244-245 and in *Kerr v. United States,* 426 U.S. 394 (1975), this Court expressed its view that highly extraordinary circumstances must obtain to justify the issuance of a Writ of Mandamus. In *Kerr,* 426 U.S. at 402-403, the Court stated:

> "The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations. . . . 'only exceptional circumstances amounting to a judicial "usurpation of power" will justify the invocation of this extraordinary remedy.' "
>
> * * *
>
> "As means of implementing the rule that the writ will issue only in extraordinary circumstances, we have set forth various conditions, for its issuance. Among these are that the party seeking issuance of the writ, . . . satisfy 'the burden of showing that [his] right to issuance of the writ is "clear and indisputable" ' . . . Moreover, it is important to remember that issuance of the

> writ is in large part a matter of discretion with the court to which the petition is addressed." (citations omitted)

As shown above, the decision below was a routine transfer decision based on factual contentions which either favored the Court's decision not to transfer or were not properly supported by Petitioners. Under the circumstances, Petitioners could not claim an indisputable right to issuance of the writ and the Court of Appeals was well within its discretion in refusing to entertain the Petition for Writ of Mandamus and this Court should also deny the Petition for Certiorari.

Conclusion.

Petitioners not only failed to carry their burden of factually establishing sufficient grounds of convenience of parties and witnesses, but further delayed seeking appellate review until extensive discovery decisions had been rendered against them. Judge O'Connor correctly held that Petitioners failed to carry their burden of proof on transfer and that the interests of justice favored trial in the Kansas District Court. The Court of Appeals correctly denied the Petition for Writ of Mandamus and there are no circumstances justifying issuance of a Writ of Certiorari to review that decision. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

By HAROLD L. JACKSON
Attorney for Respondent.

Service of the within and receipt of a copy thereof is hereby admitted this ..... day of June, A.D. 1978.

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